

1 RENE L. VALLADARES  
Federal Public Defender  
2 State Bar No. 11479  
SHARI L. KAUFMAN  
3 Assistant Federal Public Defender  
WILLIAM CARRICO  
4 State Bar No. 003042  
Assistant Federal Public Defender  
5 RYAN NORWOOD  
Assistant Federal Public Defender  
6 411 E. Bonneville Avenue, Suite 250  
Las Vegas, Nevada 89101  
7 (702) 388-6577/Phone  
(702) 388-6261/Fax  
8 Ryan\_Norwood@fd.org

9 Attorneys for Ryan W. Payne

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

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12 UNITED STATES OF AMERICA, )  
13 )  
Plaintiff, )  
14 )  
vs. )  
15 )  
RYAN W. PAYNE, )  
16 )  
Defendant. )

2:16-cr-046-GMN-PAL

**EMERGENCY MOTION TO**  
**RECONSIDER DENIAL OF**  
**DEFENDANT RYAN W. PAYNE'S**  
**MOTION TO COMPEL ELECTRONIC**  
**ACCESS TO LEGAL MATERIALS**  
**AND THE ABILITY TO**  
**COMMUNICATE**  
**TELEPHONICALLY WITH DEFENSE**  
**COUNSEL IN A CONFIDENTIAL**  
**MANNER (ECF NO. 442)**

(Expedited Hearing Requested)

19 **Certification:** This Motion is timely filed.

20 Defendant RYAN W. PAYNE, through his counsel, SHARI L. KAUFMAN,  
21 WILLIAM CARRICO, and RYAN NORWOOD, Assistant Federal Public Defenders,  
22 respectfully requests the Court to reconsider the denial of his Motion to Compel the U.S. Marshals  
23 Service to provide him meaningful electronic access to his legal materials and the ability to  
24 communicate with his defense counsel by phone in a confidential manner. Mr. Payne submits,

1 for the reasons set forth in the attached Memorandum of Points and Authorities, that he must have  
2 the ability to review his legal materials electronically and to speak confidentially with defense  
3 counsel by telephone in order to preserve his Fifth Amendment right to due process and to  
4 facilitate effective assistance of counsel under the Sixth Amendment.

5 DATED this 12<sup>th</sup> day of July, 2016.

6 RENE VALLADARES  
Federal Public Defender

7 By: /s/ Shari L. Kaufman  
8 SHARI L. KAUFMAN  
Assistant Federal Public Defender

9 By: /s/ William Carrico  
10 WILLIAM CARRICO  
Assistant Federal Public Defender

11 By: /s/ Ryan Norwood  
12 RYAN NORWOOD  
Assistant Federal Public Defender  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Defendant Ryan Payne, joined by seven co-defendants, filed a motion to compel access to his discovery and effective telephonic communication with his attorneys. ECF No. 442. The Motion explains that Payne is unable to either view his discovery or effectively communicate with his attorneys at the state facility in Oregon where he is currently detained, the Multnomah County Inverness Jail (“MCSO”) in Portland, Oregon, in connection with his parallel federal prosecution in the District of Oregon. Payne asked the Court to remedy the situation by directing the U.S. Marshal’s Office (USMS) to house him at a facility where he can effectively communicate with his attorneys and review discovery.

The government filed a response, in which it did not take a position on the requested remedy, and advised that “this matter is best resolved in a pretrial conference with the Court (as opposed to motion).” ECF No. 517.

Yet this Court neither granted the Motion nor held a conference. Instead, the Court summarily denied the motion in a two-page order. In the operative paragraph, the Court contended that the District Court of Oregon had made “extraordinary accommodations” to accommodate defendants Ryan and Ammon Bundy with respect to their prosecution in that district, and faulted Payne motion’s for purportedly failing to explain “what, if anything, has been done to work with MCSO, his Oregon counsel, the USMS, or Judge Jones” (a senior judge in the district of Oregon).

Respectfully, the Court’s reasoning is either mistaken or irrelevant. As detailed in the Motion, Payne made extensive efforts to resolve his issues with MCSO before filing the Motion. Likewise, Payne asks this Court to direct the USMS to house him in a different facility because

1 it is plain the USMS will not do so without a Court order. And contrary to the Court’s assumption,  
2 it is not the responsibility of Payne’s Oregon counsel or an Oregon judge to remedy Payne’s  
3 discovery issues with respect to his Nevada case. Rather, the issue has been properly raised by  
4 his Nevada counsel in *this* Court, and must be properly remedied by *this* Court—just as the  
5 Oregon courts have actively worked to address the discovery issues that have arisen in the Oregon  
6 case.

7 Mr. Payne’s inability to consult with his Nevada attorneys about his Nevada discovery is  
8 actively prejudicing him. The Court must either grant his Motion, or immediately hold a  
9 conference to resolve the issues raised therein.

#### 10 ARGUMENT

11 “No precise ‘rule’ governs the district court’s inherent power to grant or deny a motion  
12 to reconsider a prior ruling in a criminal proceeding.” United States v. Lopez-Cruz, 730 F.3d  
13 803, 811 (9th Cir. 2013). But “as long as a district court has jurisdiction over the case, then it  
14 possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order  
15 for cause seen by it to be sufficient.” City of Los Angeles, Harbor Div. v. Santa Monica  
16 Baykeeper, 254 F.3d 882, 889 (9th Cir. 2001); see also Luce v. United States, 469 U.S. 38, 41-42  
17 (1984) (“Indeed even if nothing unexpected happens at trial, the district judge is free, in the  
18 exercise of sound judicial discretion, to alter a previous in limine ruling.”).

19 The Court should reconsider its denial of Payne’s Motion to Compel. The Court claims  
20 that Mr. Payne has failed to indicate that he has “work[ed] with” (1) the MCSO, (2) the USMS,  
21 (3) Oregon counsel, or (4) Senior Judge Robert E. Jones of the U.S. District Court in Oregon to  
22 resolve his discovery issues, and thus concluded that Payne has failed to show that he could not  
23 procure access to counsel and discovery materials without this Court’s intervention. The Court  
24

1 was incorrect to fault Payne for not working with these agencies and people to resolve the issue.

2 Payne addresses each in turn.

3 **(1) The MCSO**

4 As Payne stated in his Motion, he has extensively discussed and sought to resolve his  
5 issues with the MCSO. See ECF No. 442, pp. 3-4 (discussing issues with Payne's access to a  
6 private phone and representing that MCSO "does not have the resources to resolve this issue");  
7 Id. pp. 5-6 (explaining that counsel "has attempted to work with MCSO staff" to allow Payne  
8 access to means to review his electronic discovery). As explained in the Motion, MCSO cannot  
9 or will not fix these issues.

10 The Court notes footnote 2 of the Motion, where Payne represents that the MCSO, in  
11 response to Payne's concerted efforts to work with the facility, finally "agreed to allow to visits  
12 with Payne at prearranged dates and times." ECF No. 590, pg. 2. This concession regarding  
13 personal visits in no way fixes the issues with electronic discovery and phone access raised in the  
14 Motion. To effectively represent Payne, his Nevada lawyers must be able to speak with him  
15 privately by phone, and Payne must be able to review his Nevada discovery. At present, neither  
16 is possible.

17 **(2) The USMS**

18 The policies regarding Payne's detention are set by the MCSO, not the U.S. Marshal's  
19 Office. The USMS can address the issues in Payne's motion by moving him to a different facility,  
20 which is the primary relief sought in Payne's motion. However, the USMS will not do this  
21 without an order from a court. This is the primary relief sought in Payne's Motion. It is not  
22 reasonable for the Court to fault Payne for failing to convince the USMS to provide the relief he  
23 seeks in the Motion.

1           **(3) Oregon counsel**

2           The Court's finding that Payne's Motion should be denied because he has not sufficiently  
3 "work[ed] with" Oregon counsel is unfounded for several reasons.

4           First, Oregon counsel, like Nevada counsel but unlike the MCSO, the USMS, or the Court,  
5 have no power to change Payne's conditions of detention on their own. Oregon counsel are in no  
6 better position than Nevada counsel to persuade the MCSO to change their policies, or persuade  
7 the USMS to move Payne to a different facility. As represented above, Nevada counsel's efforts  
8 to effect change via those agencies have been unsuccessful, and the intervention of this Court is  
9 now required.

10           Second, Oregon counsel are not responsible for fixing Payne's discovery issues with  
11 respect to his Nevada case. Nevada counsel represent that they have been in regular  
12 communication with Payne's Oregon counsel since their appointment, and that Oregon counsel  
13 are quite busy litigating their own case. The Oregon case, which is still set to go to trial in  
14 September, involves its own set of complex legal and discovery issues. See e.g., ECF No. 699 in  
15 United States v. Bundy, Case no.: 3:16-cr-00051-BR (D. Or.) (detailing the voluminous discovery  
16 that has been released in that case and the numerous outstanding issues involving that discovery).  
17 Payne's Oregon counsel have their hands full with their own case, and are no more responsible  
18 for litigating discovery issues relating to Payne's Nevada case than they are responsible for  
19 litigating his legal issues or conducting the trial in Nevada.

20           **(4) The District of Oregon**

21           Finally, the Court states that Payne's Nevada counsel are at fault for not "work[ing] with"  
22 a senior judge in the district of Oregon to resolve his discovery issues. This criticism is unfounded  
23 as well.

1           It is certainly true that the Oregon courts have taken an active role in managing discovery  
2 issues that have arisen in the Oregon prosecution. The District Court of Oregon, for example, has  
3 required monthly joint status reports on discovery issues (see e.g., ECF No. 699, noted supra),  
4 and held monthly status conferences to resolve outstanding issues. On May 24, 2016, a number  
5 of defendants (including Payne) submitted a joint status report in the Oregon case describing  
6 numerous communication and discovery issues arising from their confinement. See ECF No.  
7 601. Since then, the Oregon courts have taken some action to address these issues. As claimed  
8 in the Oregon order cited at ECF No. 590, ph. 2, Senior Judge Robert E. Jones has “lent his  
9 personal and continuing assistance . . . in engaging with jail authorities to address issues related  
10 to discovery review and attorney client contact.” Oregon counsel has represented that Payne has  
11 been transported to the Oregon court on at least two occasions to review discovery pertinent to  
12 his Oregon case.<sup>1</sup>

13           But those measures are confined *to the Oregon case*. The District of Oregon is not  
14 responsible for addressing discovery and communication issues in this case, any more than this  
15 Court is responsible for addressing litigation concerning discovery issues in the Oregon case. So  
16 long as Payne is detained and facing trial by order of this Court, this Court has a responsibility to  
17 protect his constitutional right to meaningful access to his counsel and his discovery. See e.g.,  
18 Ching v. Lewis, 895 F.2d 608, 609 (9th Cir. 1990) (recognizing that prison policies are  
19 unconstitutional if they “unnecessarily abridge the defendant’s meaningful access to his attorney  
20 and the courts,” and that the “opportunity to communicate privately with an attorney is an  
21 important part of that meaningful access.”); Halvorsen v. Baird, 146 F.3d 680, 689-90 (9th Cir.

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22  
23 <sup>1</sup> Payne makes no representation in this Motion as to adequacy of any attempts to resolve his  
24 discovery issues with respect to his Oregon case. Any such representations are properly made via  
his Oregon counsel who are most familiar with the issues.





1 it appropriate for this Court to deny the complex discovery issues raised in Payne’s pleadings “on  
2 paper” without even affording the parties a hearing or conference on the matter.<sup>2</sup>

3 Finally, undersigned counsel submit there are time-sensitive matters that require  
4 immediate attention in this litigation. For all the reasons noted above and in his prior pleadings,  
5 Payne’s Nevada attorneys cannot effectively consult with Payne about any of these matters unless  
6 they can effectively communicate and review discovery with their client. The Court should take  
7 immediate action to address this matter.

8 If the Court, despite all of the concerns noted above, believes it cannot effectively remedy  
9 the discovery issues because Payne is incarcerated and facing a parallel prosecution in another  
10 District in another State, then it should dismiss the indictment against Payne. Alternatively, and  
11 if the Court denies this Motion for Reconsideration, Payne requests that the Court toll the period  
12 for appealing the denial (ECF No. 590) until the issuance of the Court’s ruling.

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22 <sup>2</sup> Most recently, this Court denied Payne’s Motion for an Emergency Status Hearing. (ECF Nos.  
23 597, 560). In that order, the Court noted that motions concerning the government’s proposed  
24 protective order for the discovery – a complex issue involving numerous objections from the  
defendants and an intervention by the *Las Vegas Review-Journal* – would be decided on paper  
without affording the parties oral argument. ECF No. 597.

1 DATED this 12<sup>th</sup> day of July, 2016.

2 Respectfully Submitted,

3 RENE VALLADARES  
4 Federal Public Defender

5 By: /s/ Shari L. Kaufman  
6 SHARI L. KAUFMAN  
Assistant Federal Public Defender

7 By: /s/ William Carrico  
8 WILLIAM CARRICO  
Assistant Federal Public Defender

9 By: /s/ Ryan Norwood  
10 RYAN NORWOOD  
Assistant Federal Public Defender

**CERTIFICATE OF ELECTRONIC SERVICE**

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on July 12, 2016, he served an electronic copy of the above and foregoing **EMERGENCY MOTION TO RECONSIDER DENIAL OF DEFENDANT RYAN W. PAYNE'S MOTION TO COMPEL ELECTRONIC ACCESS TO LEGAL MATERIALS AND THE ABILITY TO COMMUNICATE TELEPHONICALLY WITH DEFENSE COUNSEL IN A CONFIDENTIAL MANNER (ECF NO. 442) (expedited hearing requested)** by electronic service (ECF) to the person named below:

DANIEL G. BOGDEN  
United States Attorney  
ERIN M. CREEGAN  
Assistant United States Attorney  
NADIA JANJUA AHMEN  
Assistant United States Attorney  
NICHOLAS DICKINSON  
Assistant United States Attorney  
STEVEN MYHRE  
Assistant United States Attorney  
501 Las Vegas Blvd. South  
Suite 1100  
Las Vegas, NV 89101

/s/ Lauren Pullen  
Employee of the Federal Public Defender